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IN THE

Supreme Court of the United States

October Term, 1984

L.E. MORRISON and JEAN MORRISON,

Petitioners,

vs.

COUNTY OF SAN DIEGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

GOEBEL & MONAGHAN
By: LOUIS E. GOEBEL
401 West A Street
San Diego, California 92101
Telephone: (619) 231-0059

Attorneys for Petitioners

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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QUESTIONS PRESENTED

1. Does a property owner whose property is taken under the power of eminent domain receive the just compensation which the Constitution guarantees when he receives substantially less than the fair market value of his property on the date payment is tendered by the condemning agency?

2. Does a seven year delay between the date of valuation of condemned property and the date of payment by the condemning agency violate the guarantees of the Fifth Amendment of just compensation on the taking of private property for public use?

3. Does the Fifth Amendment and this Court's recent decision in *Kirby Forest Industries, Inc. v. United States*, compel a modification to the condemnation award herein where there is a seven year delay between the date of valuation and the date of payment, during which time the value of the land changed dramatically?

4. Is the attempt to pay a condemnation award only in 1980, when the award is based on 1973 values, and when the property has increased dramatically in value during the period, such a clear violation of the Fifth Amendment as to require this Court's intervention to assure just compensation to the property owner?

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No. _____

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COUNTY OF SAN DIEGO,

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

Petitioners L.E. Morrison and Jean Morrison respectfully pray that a writ of certiorari issue to review the order of the California Supreme Court denying hearing and the judgment and opinion of the California Court of Appeal, Fourth Appellate District, which affirmed a judgment in condemnation which required the valuation of petitioners' condemned property as of February 16, 1973, even though payment was not tendered until May 9, 1980, and in the intervening period, the effects of inflation were dramatic and the value of the property had increased even more dramatically.

OPINIONS BELOW

The order of the California Supreme Court issued on June 21, 1984, denying a hearing in the California Supreme Court, is set forth in Appendix A, *infra*. The opinion of the California Court of Appeal, Fourth Appellate District, filed March 29, 1984, is set forth in Appendix B, *infra*. The Court of Appeal opinion was modified by an "Order Modifying Opinion," filed April 17, 1984, which is set forth in Appendix C, *infra*. The Judgment in Condemnation of the San Diego County Superior Court is set forth in Appendix D, *infra*.

JURISDICTION

The order of the California Supreme Court denying hearing was filed on June 21, 1984. This was the final action of the highest court of the state. This action had the effect of affirming or allowing to stand the opinion of the California Court of Appeal, of which review is sought. Jurisdiction of this Court is proper pursuant to 28 U.S.C.A. § 1257(3).

BACKGROUND

This petition arises from an action commenced in the California state courts in eminent domain whereby the respondent County of San Diego has taken from petitioners L.E. Morrison and Jean Morrison some 69 acres of land upon which the Morrisons for a number of years had operated a sand extraction business and related activities. This case has been in the courts for more than 10 years and its uniqueness flows in substantial part from its history. Thus, its factual and procedural history will be summarized:

- About 1962 - the Morrisons begin operation of a sand extraction business on a large parcel of replenishing sand property in Bonita, California, a then rural area near San Diego, acquiring over the years other parcels of adjoining property.

- February 16, 1973 - County of San Diego filed a complaint in eminent domain to acquire the Morrisons' real property in fee.

- April 14, 1974 - First trial of eminent domain action commenced in San Diego County Superior Court.

- November 15, 1974 - Judgment was entered, awarding the Morrisons $837,000 for the real property interests taken, based upon a February 16, 1973 date of valuation.

- November 17, 1974 - Condemnor County of San Diego appealed from the judgment.

- The Morrisons did not prosecute a cross-appeal.

- February 14, 1977 - California Court of Appeal filed its opinion reversing the original judgment and remanding the case for a new trial.

- May 9, 1980 - Condemnor County of San Diego first makes a deposit of probable just compensation for the fee interest taken in the amount of $519,000.

- August 13, 1980 - Condemnor County of San Diego takes possession of the Morrisons' real property and the Morrisons and their business are dispossessed.

- October 5, 1981 - Retrial or second trial of action commenced in San Diego County Superior Court.

- October 28, 1981 - Jury returned a verdict for the value of the real property taken in the amount of $875,000. The date of valuation required to be used by the jury was February 16, 1973.

- December 16, 1981 - Judgment in Condemnation entered.

- February 11, 1982 - Condemnor filed notice of appeal.

- March 5, 1982 - Morrisons filed notice of cross-appeal.

- March 19, 1984 - California Court of Appeal filed its opinion on appeals from the second judgment.

- April 17, 1984 - California Court of Appeal filed order modifying opinion.

- April 30, 1984 - Morrisons filed timely petition for hearing to the California Supreme Court.

- May 21, 1984 - This Court decided the case of *Kirby Forest Industries, Inc. v. United States*.

- June 21, 1984 - California Supreme Court denied petitioners' request for hearing.

- Petitioners bring this timely request for writ of certiorari to the California courts to review the order denying hearing and the opinion and judgment of the California Court of Appeal.

The effects of these actions were that:

- Petitioners' real property has been taken from them.

- Petitioners' real property was valued by the jury as of February 16, 1973.

- Petitioners did not receive even partial payment for the real property interests taken until May 9, 1980, more than seven years later.

- During this seven year period, the area around the Morrisons' property urbanized to a substantial degree and this, together with general inflationary effects, caused the value of the Morrisons' property to increase dramatically.

The gross unfairness and inequity of this situation, together with the federal constitutional implications were urged by petitioners before all of the California state courts. In particular, detailed excerpts of briefs filed in the appellate courts are set forth herein as Appendices E and F.

Despite the urgings of petitioners, the California state courts focused on the language of state statutes and state case law, and refused to address the federal constitutional issue. Under general constitutional principles of the Fifth Amendment to the United States Constitution

made applicable to the states by the Fourteenth Amendment, as well as under the express holding of this Court's recent *Kirby Forest Industries, Inc.* case, petitioners seek a remedy to modify the condemnation award to render it consistent with the requirements for just compensation guaranteed by the Fifth Amendment.

ARGUMENT

I

IN A CONDEMNATION CASE, WHERE THERE IS A SUBSTANTIAL DELAY BETWEEN THE DATE OF VALUATION AND THE DATE PAYMENT IS TENDERED, THE CONSTITUTION REQUIRES THAT MATERIAL CHANGES IN THE VALUE OF THE LAND OVER THE PERIOD BE CONSIDERED AND THE CONDEMNATION AWARD MODIFIED ACCORDINGLY

Private property rights were granted a favored place in the jurisprudence of our country from the days of its founding. Express constitutional guarantees were provided from the outset. As the country has grown and developed, both the federal government and various agencies of the several states have adopted statutes and regulations to implement and enforce these guarantees, while facilitating a shift of private property into public ownership for public use through the exercise of the power of eminent domain.

But, however helpful and desirable these detailed provisions of statute may be, it is inescapable that the *ultimate* test of the eminent domain power lies in the Constitution itself.

This Court has clearly enunciated the applicable standard:

> The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken. *United States vs. Miller*, 317 U.S. 369, 373, 63 S.Ct. 276 (1943).

Despite these principles, in this case, the California state courts were preoccupied with state statutes and state case law and failed to appreciate or act upon the constitutional implications of the mechanical application of these state statutes and state case law to the unique facts of this case. The result was a direct and glaring violation of the Fifth Amendment of the United States Constitution.

This Court's direction in the *Seaboard Airline Railway* case was called to the attention of the California state courts without avail:

> It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right and section 10 of the Lever Act directs payment. . . . The requirement that "just compensation" shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306, 43 S.Ct. 354, 356 (1923).

The California Court of Appeal responded, relying upon state case law, without consideration of the federal constitutional principles:

> This result is harsh, especially when several inflationary years separate the issuance of summons and retrial. Although the new law changes this result, it does not apply to this case and the Morrisons are therefore bound by *Murata*. [*People v. Murata* (1960) 55 Cal.3d 1.] Slip Opinion of California Court of Appeal, Appendix B, p. 9.

Through the unfortunate quirk of timing, at the time this case was before the California Court of Appeal for decision, this Court's teaching in the case of *Kirby Forest Industries, Inc. v. United States*, ____ U.S. ____, 52 U.S.L.W. 4607 (May 21, 1984), was not yet available.

Now, it is clear both under general constitutional principles and this Court's express holding in *Kirby Forest Industries* that a seven year delay between the date of valuation and the date of tender of payment, coupled with a dramatic increase in property value, compels a modification of the condemnation award in order to provide petitioners with the just compensation guaranteed by the Constitution.

II

THIS CASE IS SQUARELY WITHIN THE HOLDING OF THIS COURT'S RECENT *KIRBY FOREST INDUSTRIES* CASE, AND ITS FACTS ARE EVEN MORE COMPELLING

In the case of *Kirby Forest Industries v. United States*, ____ U.S. ____, 52 U.S.L.W. 4607, decided May 21, 1984, this Court unanimously, through Mr. Justice Marshall, held that a solution to the problem of delay between the date of valuation and the date of payment "requires . . . a procedure for modifying a condemnation award when there is a substantial delay between the date of valuation and the date the judgment is paid, during which time the value of the land changes materially." ____ U.S. ____, 52 U.S.L.W. at 4612.

Such a procedure is precisely what petitioners herein request. In the *Kirby Forest Industries* case, the period between the date of valuation and the date of payment was only slightly more than three years and there was some dispute as to whether the value of the property had indeed increased.

In compelling contrast to those facts, in the instant case, the period of delay between the date of valuation and the date of tender of payment was from February 16, 1973 to May 9, 1980, a period of more than seven years, and there is no dispute whatsoever that the value of the property appreciated (or even multiplied) dramatically over the period.

The trial judge recognized the inequity of this result because of the rising market when he stated:

> THE COURT: Well, I sympathize with the philosophical points made by Mr. Goebel that under all of the circumstances, it certainly can be viewed as placing the property

> owners in a somewhat inequitable position because of the rising market.
>
> On the other hand, it just appears to me that this statutory language is crystal clear. . . .
>
> . . . .
>
> I just feel I have no alternative but to make that ruling, although I admit that in fairness and equity were I to write the law myself, I might have written it somewhat differently, but I did not. Reporter's Transcript, p. 15, ll. 22-26, p. 16, ll. 1-14.

The California Court of Appeal declared:

> This result is harsh, especially when several inflationary years separate the issuance of summons and retrial. Although the new law changes this result, it does not apply to this case and the Morrisons and therefore bound by *Murata*. Slip Opinion of California Court of Appeal, Appendix B, p. 9.

However, both the trial court and the California Court of Appeal focused upon state statutes and state case law and failed to reach the federal constitutional question, even though it was clearly before them.

The facts here are even more compelling that those in the *Kirby Forest Industries* case. This Court should act, as it did in *Kirby Forest Industries* and mandate a procedure for modifying the condemnation award so as to satisfy the constitutional guarantee of just compensation.

Since this is a case in the California state courts and not the federal courts, the Federal Rules of Civil Procedure, Rule 60(b), procedure suggested by the Court in *Kirby Forest Industries* will not be available, and a direct remand with instructions would appear to be the most appropriate remedy.

III

THE FEDERAL CONSTITUTIONAL QUESTION WAS PROPERLY RAISED AND IS PROPERLY BEFORE THIS COURT

Review on writ of certiorari by this Court is sought pursuant to Rule 17(c) on the ground that a state court, the California Court of Appeal, has decided a federal question in a way in conflict with the applicable decisions of this Court and in violation of the United States Constitution. In particular, the California Court of Appeal in its opinion refused to consider the federal constitutional question, but rather, relied upon state statute to the contrary. The statute purportedly relied upon was former § 1249 of the California Code of Civil Procedure which purports to establish a date of valuation without regard to consideration of an unreasonable delay between the date of valuation and the date of actual payment. [The text of former § 1249 of the California Code of Civil Procedure is set forth in Appendix G, *infra*.]

Petitioners have asserted the fundamental unfairness and inequity of the application of this statute to the unique facts of this case at all levels in the California state courts to no avail. The state courts have consistently relied upon the state statute and state cases interpreting the statute, rather than reaching the federal constitutional question. The detailed assertion of petitioners' federal constitutional position to the appellate courts are set forth in excerpts of briefs filed with the California Court of Appeal and the California Supreme Court, respectively, as Appendices E and F, *infra*.

IV

CONCLUSION

The proper disposition of this matter has been rendered clear by the direction supplied by the *Kirby Forest Industries, Inc.* case. If three years delay between the date of valuation and the date of payment and a disputed change in value is sufficient to warrant a hearing to amend the condemnation award, it should follow clearly that a seven year delay and a dramatic increase in value compels a hearing to amend the condemnation award so as to satisfy the requirements of the Fifth Amendment for just compensation. As this Court stated in *Kirby Forest Industries, Inc.*:

> In our view, such a reassessment is both necessary and sufficient to provide petitioner just compensation. ____ U.S. ____, 52 U.S.L.W. 4612.

The petitioners have struggled through the California courts for more than a decade, suffering the disadvantages of timing and the arbitrary application of state statutes without consideration of federal constitutional implications. The time is now ripe for this Court to correct the injustice done by the unfortunate timing of past events, apply the clear direction of the *Kirby Forest Industries, Inc.* case to the clear facts of this case and provide these petitioners with the just compensation for which they have waited so long.

Respectfully submitted,

GOEBEL & MONAGHAN

By: LOUIS E. GOEBEL

Attorneys for Petitioners

APPENDICES

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUN 21 1954

I have this day filed Order _____

_____

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HEARING DENIED

_____

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_____

In re: 4 Civ. *No.* 26710

COUNTY OF SAN DIEGO

vs.

L.E. MORRISON, et al.

Respectfully,

Clerk

BEST AVAILABLE COPY

CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED
Keenan G. Casey, Clerk
MAR 19 1984
COURT OF APPEAL FOURTH DISTRICT

COUNTY OF SAN DIEGO, Plaintiff and Appellant, v. L. E. MORRISON, ET AL., Defendants and Cross-Appellants.	4 Civ. No. 26710 (Super. Ct. No. 339813)

APPEAL from a judgment of the Superior Court of San Diego County, James L. Focht, Judge. Affirmed in part as modified; reversed in part and remanded.

Joseph Kase, Jr., County Counsel, Lloyd M. Harmon, Jr., Chief Deputy County Counsel and Sandra J. Brower, Deputy County Counsel, for Plaintiff and Appellant.

Goebel & Monaghan, Louis E. Goebel and James E. Rubnitz for Defendants and Cross-Appellants.

This appeal arises from a long-standing eminent domain proceeding initiated by the County of San Diego (County) in 1973 to acquire 69.17 acres from L. E. and Jean Morrison (Morrisons) for the development of Sweetwater Regional Park.

The case first went to trial in 1974 to resolve the principal issue of the property's fair market value. The County appealed the judgment

[1]Certified for publication with the exception of sections II through IV.

rendered in that trial on grounds not at issue here and this court reversed. The judgment entered in December 1981 after retrial included $56,250 as compensation for loss of business goodwill. The County appeals this portion of the judgment, contending the applicable law does not provide compensation for loss of business goodwill.

The Morrisons' cross-appeal focuses on three areas. The judgment was based on the fair market value of the property on February 16, 1973, the date the original complaint and summons were filed. The judgment also included an award of interest at the legal rate of seven percent per annum on two figures: $356,000 (the difference between the amount the County had deposited as probable compensation ($519,000) and the amount found by the jury to be the fair market value ($875,000)) and $56,250 (the loss of business goodwill). The Morrisons challenge the selected valuation date, arguing it should be May 9, 1980, the date the County deposited probable compensation, rather than February 16, 1973. They also challenge the award of seven percent interest, contending the rate is too low to justly compensate them and should be based on the prevailing market rate of interest. Finally, the Morrisons appeal the court's denial of their motion to recover litigation expenses.

Because we decide the law governing this action does not provide compensation for loss of business goodwill, we modify the judgment to exclude that award and accompanying interest. We also hold the court properly selected February 16, 1973 as the valuation date and correctly denied the Morrisons' motion to recover litigation expenses. As to those issues, we affirm the judgment as modified. However, in light of *Redevelopment Agency v. Gilmore* (1984) 150 Cal.App.3d 1091, 1095-1096, we reverse the award of seven percent interest on the $356,000 unpaid value of the Morrison's property and remand the matter for a determination of the applicable market rate of interest.

Factual and Procedural Background

Many of the problems in this case result from the long span of years separating the date of complaint from the judgment entered after retrial. During this time period, property values appreciated, interest rates reached record highs and the Legislature enacted a new body of law to govern eminent domain proceedings.

When the County began proceedings on February 16, 1973, eminent domain law in California was controlled by former title 7 of part 3 of the Code of Civil Procedure,[2] consisting of sections 1237 and 1267. This entire law was repealed and reenacted in 1975 (stats. 1975, c. 1275, §§ 1, 2, p. 3409, operative July 1, 1976) with the revised statute, entitled "Eminent Domain Law," included in new title 7 of part 3. (§ 1230.010 et seq.)

The new law became operative while this case was on appeal following the first trial. However, the former law properly governed appellate review in light of section 1230.065 which provides:

> "(a) This title becomes operative July 1, 1976.
>
> "(b) *This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976.* Subject to subdivisions (c) and (d), in the case of an eminent domain proceeding which is commenced on or after January 1, 1976, but prior to the operative date, this title upon the operative date applies to the proceeding to the fullest extent practicable with respect to issues to be tried or retried.
>
> "(c) Chapter 3 (commencing with Section 1240.010), Chapter 4 (commencing with Section 1245.010), and Chapter 5 (commencing with Section 1250.010) do not apply to a proceeding commenced prior to the operative date.
>
> "(d) *If, on the operative date, an appeal,* motion to modify or vacate the verdict or judgment, or motion for new trial *is pending, the law applicable thereto prior to the operative date governs the determination of the appeal or motion.* (Italics added.)

Following reversal, the case was set for retrial. Although originally scheduled for July 1978, several continuances granted at the Morrisoins' request delayed the trial date by more than three years. Pending retrial, the Morrisons successfully moved for leave to supplement their answer by adding a request for compensation for loss of business goodwill. The

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[2]All statutory references are to the Code of Civil Procedure unless otherwise indicated.

motion was based on the new eminent domain law, section 1263.510 which, unlike the old law, provides for compensation for loss of business goodwill. The County opposed the motion on the basis the new law did not apply to this case, citing section 1230.065.

Although the County attempted to defeat the amendment through several writ and motion proceedings, the case went to trial with the issue of goodwill compensation placed before the jury. Comments made by this court in denying the County's first writ petition and by the trial court at a motion hearing indicated the first court's earlier granting of leave to supplement the answer was in error, but that the error could be corrected only on appeal. In order to prevent the need for a retrial on this issue, the trial court specifically submitted a special verdict regarding goodwill compensation.

At retrial the jury found the fair market value of the property on February 16, 1973 was $875,000 and the compensable loss of business goodwill was $56,250. The judgment in condemnation entered by the court included an award of seven percent interest per annum running from August 13, 1980, the date the County took possession of the property. The record does not reveal what steps, if any, the Morrisons took either before or after judgment to challenge the award of seven percent interest.

After trial, the Morrisons moved to recover litigation expenses under the federal and state constitutions and under former section 1249.3 and present section 1250.410. The court denied the motion, finding the Morrisons did not timely file and serve the County with a final demand as required as a condition to recovery under the code.

Discussion

I

Payment for loss of business goodwill resulting from condemnation is not constitutionally required. (*Community Redevelopment Agency v. Abrams* (1975) 15 Cal.3d 813, 831-832, cert. den., 429 U.S. 869.)[3] The

[3]"The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, [citation], provides in relevant

(Footnote 3 continued on page B-5)

Legislature, in enacting the new eminent domain law (§ 1230.010 et seq.), made such compensation available for the first time. (See § 1263.510.) Because the new law did not become operative until July 1, 1976, compensation for loss of business goodwill was not available to the Morrisons at their first trial.

The County, pointing to section 1230.065 (see *ante*), contends such compensation also was not available at the second trial. It explains that since the proceeding began on the date the complaint was filed, February 16, 1973, subdivision (b) controls and prohibits application of the new law in stating: "This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976." The Morrisons argue that we cannot rely solely on the statute but must also consider the legislative comments to section 1230.065. If we do so they believe we will conclude their second trial was governed by the new law. Although we accommodate the Morrisons' request to consider the legislative history, we nonetheless hold the statutory language is clear in prohibiting application of the new law to this case.[4]

The language of section 1230.065 is clear and unambiguous on its face. The general principle in cases where there is no need for construction is to refrain from indulging in it. (*People v. Belleci* (1979) 24 Cal.3d 879, 884; *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198.) While the Morrisons apparently agree the new law is inapplicable to a proceeding started before January 1, 1976 which reaches a *first trial* after that date, they argue a case scheduled for *retrial* after January 1, 1976 following

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(Footnote 3 continued)

part: '. . . nor shall private property be taken for public use, without just compensation.' [¶] Article I, section 19 (replacing former art. I, § 14) of the California Constitution provides in relevant part: 'Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.'" (*Id.*, at p. 816, fn. 2.)

[4]The Morrisons also present an "operative facts" argument, i.e., the new law should apply here because they lost their business when the County took possession in August 1980, four years after the new law's operative date. Neither the statute nor the comments, however, refer to "operative facts" or attach any significance to when such facts occur. The controlling event for application of the new law is the commencement of the eminent domain proceeding (see § 1230.065, subds. (b) and (c)), not the occurrence of any particular operative fact.

appeal is governed by the new law. They rely on the legislative committee comment to section 1230.065 which discusses subdivision (d) and provides if a posttrial motion or appeal results in a new trial, "this title would govern the further proceedings in the action under subdivision (b)."[5] Referring back to subdivision (b), however, we are confronted with the first sentence: "This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976."

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[5]The Legislative Committee comment to section 1230.065 provides:

"Subdivision (a) of Section 1230.065 delays the operative date of this title until July 1, 1976, to allow sufficient time for interested persons to become familiar with the new law.

"Subdivision (b) adopts the policy that this title is to apply to the fullest extent practicable to pending proceedings except those commenced more than six months before the operative date. In most proceedings commenced within six months before the operative date, except perhaps those in trial are [*sic*] awaiting imminent trial, the immediate application of this title would not delay the parties or court in proceeding to judgment. Immediate application moreover, would prevent inconsistencies of result as between proceedings commenced shortly prior to the operative date and those commenced shortly thereafter. The phrase 'to the fullest extent practicable' is intended to give the court discretionary power to adapt the application of the title to the circumstances of individual cases, thereby reducing the possibility that immediate application of these provisions to pending litigation might in special cases cause injustice.

"Subdivision (c) excludes from application to pending proceedings provisions dealing with the right to take, precondemnation activities, and pleadings.

"Subdivision (d) provides, in the interest of fairness, that any decision of a posttrial motion or appeal pending on the operative date should be based upon the law that was applicable where [*sic*] the action was tried. It would be unfair to hold litigants to a different rule of law in the determination of claimed error than the law which governed at the time the claimed error was committed. ***If the motion or appeal results in a new trial, however, this title would govern the further proceedings in the action under subdivision (b).***" (Italics added.)

These two statements appear contradictory and are best explained by the fact that amendments made to section 1230.065 while it was being considered by the Legislature were not fully dealt with by the comments. The new eminent domain law was designed to be retroactive, but during the legislative process an amendment made it nonretroactive. Some of the comments addressing retroactivity were altered to reflect this change, but the comments regarding retrial remained untouched, possibly due to oversight.

Section 1230.065 was introduced on December 2, 1974, as AB 11 by Assemblyman McAlister. As introduced, the eminent domain law was intended to apply to proceedings already commenced:

> "(b) Subject to subdivisions (c) and (d), in the case of an eminent domain proceeding commenced prior to the operative date, this title upon the operative date applies to the proceeding to the fullest extent practicable with respect to issues to be tried or retried." (§ 1230.065, subd. (b) of AB 11 as introduced Dec. 2, 1974.)

Subdivision (d) and the committee comments to that subdivision were the same in 1974 as they are now.[6] In the context of the statute as introduced, the comment correctly and logically explained the new law would govern a new trial after the operative date even if the case had commenced prior to that date. This paralleled treatment of cases coming to *first* trial after the operative date, which also were governed by the new law. (See subd. (b) of AB 11 as introduced, *ante*.)

On April 10, 1975, AB 11 was amended to prohibit retroactive application. At the time of this amendment, the comment to subdivision (b) also was amended to reflect the altered intent. (Compare fns. 5 and 6, *ante*.) However, the comment to subdivision (d) was not amended, even though it had been drafted when the statute was to be applied retroactively.

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[6]The original committee comment to section 1230.065, subdivision (b) differed from the final comment. The original comment provided in part:

> "Subdivision (b) adopts the policy that this title is to apply to the fullest extent practicable to pending proceedings. In most proceedings, except perhaps those in trial or awaiting imminent trial, the immediate application of this title would not delay the parties or court in proceeding to judgment. . . ."

The law we are left with expressly precludes retroactive application and yet, through the comment to subdivision (d), seems to suggest a legislative intent to apply the new eminent domain law to cases on retrial. The best explanation for this contradictory comment is oversight. Explicit steps were taken to amend subdivision (b) to eliminate retroactivity and the comments to subdivision (b) were accordingly modified. Subdivision (d) was not amended, and perhaps it did not occur to the legislators to review the comments relating to that subdivision. If the Legislature had intended the new law to apply to cases at retrial, it would have amended the statute to reflect that intent. Since it did not, we are left with an unambiguous statute and ambiguous legislative history and will therefore rely on the statute to deny application of the new law to the Morrisons. Our conclusion comports with the general rule that resort to legislative history is unnecessary when statutory language is certain and unambiguous. (*People v. Flores* (1979) 92 Cal.App.3d 461, 472.) "[W]e are not free to substitute legislative history for the language of the statute." (*Aronsen v. Crown Zellerbach* (9th Cir. 1981) 662 F.2d 584, 588, fn. 7, cert. den., 103 S.Ct. 1183.)

This result is unfair to the extent the Morrisons are denied compensation for a loss for which others will receive compensation. However, it is within the Legislature's power in the field of economic regulation to select a date certain from which new benefits will be bestowed. Such a chronological classification provides for orderly transition and bears a rational relationship to an appropriate governmental objective. (*Carson Redevelopment Agency v. Wolf* (1979) 99 Cal.App.3d 239, 243-245.)

II

On cross-appeal, the Morrisons challenge the valuation date of February 16, 1973 which was used both at trial and at retrial. Relying on new section 1263.110, the Morrisons propose the date the County deposited probable compensation, May 9, 1980, as the correct date. Because we have already decided the new law does not apply to this case, the valuation date must be determined by the prior law, which provided:

> "For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons . . . provided, that in any case in which the issue is not tried within one year after the date of the commencement of the

> action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. . . ." (Former § 1249, repealed by stats. 1975, c. 1275, § 1, p. 3409.)

The summons in this case was filed by the County on February 16, 1973 and that date was used as the valuation date at the first trial even though that trial began more than one year after the issuance of summons. The record does not reveal who or what caused the delay, but the parties apparently agreed on February 16, 1973 as the correct date. The Morrisons later agreed in a stipulation filed with the court to retain February 16, 1973 as the valuation date for purposes of retrial. Once that valuation date was determined at the first trial it became the applicable date for all further proceedings, including retrial. (*People v. Murata* (1960) 55 Cal.2d 1, 10.) This result is harsh, especially when several inflationary years separate the issuance of summons and retrial. Although the new law changes this result, it does not apply to this case and the Morrisons are therefore bound by *Murata*.

III

Relying on *Redevelopment Agency v. Gilmore, supra*, 150 Cal.App.3d at pp. 1095-1096, the Morrisons argue they are entitled under the Fifth and Fourteenth Amendments to the United States Constitution to interest on the $356,000 unpaid value of their property at the prevailing market rate rather than the legal rate. The County points out the Morrisons did not challenge the award of seven percent interest in the trial court, and argues that omission precludes them from raising the interest rate issue for the first time on appeal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

As a general rule, trial lawyers must make a record to preserve an issue for appeal. Like all rules, however, this general statement must be qualified where there is a sharp break in the law and the lawyer should not reasonably be charged with anticipating that change (*Chamberlain v. Ventura County Civil Service Com.* (1977) 69 Cal.App.3d 362, 372) or where, as a practical matter, making the record would be an exercise in futility. (Civ. Code, § 3532; *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418, mod. 34 Cal.3d 732b.) Lawyers are not required to test judicial temperament by futilely attempting to make useless objections. Although *Gilmore's* market rate interest holding was

foreshadowed before retrial here by two Ninth Circuit cases (*United States v. 429.59 Acres of Land* (9th Cir. 1980) 612 F.2d 459, 464-465; *United States v. Blankinship* (9th Cir. 1976) 543 F.2d 1272, 1274-1277), the Morrisons faced the same trial judge below who rejected the condemnee's request for market rate interest in *L & M Professional Consultants, Inc. v. Ferreira* (1983) 146 Cal.App.3d 1038. In light of that previous contrary ruling on the merits, it would have been an exercise in futility for the Morrisons to have challenged the court's award of seven percent interest in this case. (See Civ. Code, § 3532; compare *Sea & Sage Audubon Society, Inc. v. Planning Com., supra,* 34 Cal.3d at pp. 418-419.) Because we are persuaded by the holding and rationale in *Gilmore*, we remand for a determination of the applicable market rate of interest. (See *Redevelopment Agency v. Gilmore, supra,* 150 Cal.App.3d at pp. 1100-1101.)

IV

The payment of litigation expenses is not constitutionally required. (*Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 Cal.3d 648, 658; *County of Los Angeles v. Ortiz* (1971) 6 Cal.3d 141, 148.) However, the Legislature provided a method of recovery via former section 1249.3:

> "At least 30 days prior to the date of trial, plaintiff shall file with the court and serve a copy thereof on defendant its final offer to the property sought to be condemned and *defendant shall in like manner, file and serve a copy thereof on plaintiff his final demand for the property sought to be condemned.* Service shall be accomplished in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.
>
> "If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the condemnor was unreasonable and that the demand of condemnee was reasonable, all viewed in the light of the determination as to the value of the subject property, the costs allowed pursuant to Section 1255 shall include all expenses reasonably and necessarily incurred in preparing for and in conducting the condemnation trial including,

> and not limited to, reasonable attorney's fees, appraisal fees, surveyor's fees, and the fees for other experts, ...
>
> "In determining the amount of attorneys [*sic*] fees and expenses to be awarded under this section, the court shall consider written, revised or superseded offers and demands served and filed prior to or during the trial." (Former § 1249.3, repealed by stats. 1975, c. 1275, § 1, p. 3409.)

The Morrisons never filed or served a final demand on the County. The purpose of former section 1249.3 was "to encourage early settlement so trial can be avoided. Since one of the bargaining parties is a person representing a governmental agency, who cannot make a binding agreement without the agency's approval, a 30-day minimum time period is necessary to complete a settlement. *To achieve the statute's goal, the 30-day minimum time period must be mandatory.* [¶] . . . As a means of encouraging negotiations before trial, the Legislature put incentives into the statute. *The condemnee who makes a timely final demand and goes to trial only when the offer is unreasonable has the potential of being reimbursed for expenses which he could not otherwise recover*; likewise, the condemner who makes a timely reasonable offer, whether it is accepted by the condemnee or not, may avoid having to pay the condemnee's extraordinary costs. *The property owner, by not filing a final demand when he thinks the condemner's offer is unreasonable, forfeits the possibility of recovering costs*; the condemner, by not filing a final offer, may be liable for the property owner's extraordinary costs where the owner has made a final demand." (*People ex rel. Dept. of Transportation v. Callahan Brothers* (1977) 69 Cal.App.3d 541, 543-544, italics added; accord, *City of San Leandro v. Highsmith* (1981) 123 Cal.App.3d 146, 153-155;[7] *Lake County Sanitation Dist. v. Schultz* (1978) 85 Cal.App.3d 658, 668-669; see also *People ex rel. Dept. of Transportation v. Patton Mission Properties* (1979) 89 Cal.App.3d 204, 212-213; but see

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[7] *Highsmith* considered the effect of an untimely final demand under section 1250.410, the successor to former section 1249.3. This distinction, however, is largely meaningless because section 1250.410 continues the substance of former section 1249.3. (*People ex rel. Dept. of Transportation v. Sunshine Canyon, Inc.* (1979) 94 Cal.App.3d 599, 601, fn. 1.) In *State of California ex rel. State Pub. Works Bd. v. Turner* (1979) 90 Cal.App.3d 33 this court examined only the reasonableness of the condemner's final offer and did not consider the issue of the timeliness of the condemnee's final demand. (*Id.*, at p. 36, fn. 2.)

People ex rel. Dept. of Transportation v. Societa Di Unione E Beneficenza Italiana (1978) 87 Cal.App.3d 14, 20-22.)

The Morrisons attempt to salvage their claim to litigation expenses by arguing they made an informal final demand which substantially complied with the notice requirements of former section 1249.3. They argue their decision not to cross-appeal the judgment entered after the *first trial* constituted a substitute final demand before *retrial* for the amount of the original judgment. Such informal methods, however, do not meet the statutory requirements. As the court explained in *City of San Leandro v. Highsmith, supra,* 123 Cal.App.3d at p. 155, "a recital of the demand and offer in a settlement conference statement, or in any other document, is not an adequate substitute for the formal demand and offer contemplated by section 1250.410[*] unless the parties have stipulated to a less formal exchange. The Legislature did not direct the parties to 'apprise' each other or 'communicate' with each other about an offer or demand. It mandated that a 'final offer of compensation' and a 'final demand for compensation' shall be served on the opposing party and filed with the court in the manner prescribed for service of a notice of motion." Accordingly, the court below correctly denied the Morrisons' motion to recover litigation expenses.

Disposition

The judgment is modified by striking the award of $56,250 as compensation for loss of business goodwill plus interest awarded on that sum. As modified, the judgment is affirmed except as to the award of seven percent interest on the $356,000 unpaid value of the Morrisons' property. That award is reversed and the case is remanded for further proceedings to determine the applicable market rate of interest.

CERTIFIED FOR PARTIAL PUBLICATION.

WE CONCUR:

WIENER, Acting P.J.

WORK, J.

BUTLER, J.

[*]See fn. 7, *ante*.

C-1

CERTIFIED FOR PARTIAL PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED
APR 17 1984

COUNTY OF SAN DIEGO, Plaintiff and Appellant, v. L. E. MORRISON, ET AL., Defendants and Cross-Appellants.	**ORDER MODIFYING OPINION** 4 Civ. No. 26710 (Super. Ct. No. 339813)

THE COURT:

The opinion filed on March 19, 1984 is modified as follows:

1. On page 3, the last sentence in the first full paragraph is modified to read:

> "However, we reverse the award of seven percent interest on the $356,000 unpaid value of the Morrisons' property and remand the matter for a determination of the applicable market rate of interest."

2. On page 13, the first partial sentence under part III is modified to read:

> "Relying on *Redevelopment Agency v. Gilmore* (1984) 150 Cal.App.3d 1091, 1095-1096, the Morrisons argue they are . . . ."

cc:All parties

DONALD L. CLARK, County Counsel
County of San Diego
LLOYD M. HARMON, JR., Chief Deputy
JACK LIMBER, Deputy
355 County Administration Center
San Diego, California 92101
(714) 236-3550

Attorneys for Plaintiff

FILED
Robert D. Zumwalt, Clerk
DEC 15 1981
BY K. KNOLL, Deputy

ENTERED
DEC. 16, 1981
Judgment Book 1391 Pg. 231

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

No. 339813

COUNTY OF SAN DIEGO,

Plaintiff,

v.

L. E. MORRISON, et al.,

Defendants.

JUDGMENT IN CONDEMNATION (PARCELS 71-0083, A, B, C, D & E - MORRISON)

This eminent domain proceeding brought by the County of San Diego for the condemnation for County regional park purposes of the real property situated in the County of San Diego, State of California, and more particularly described in plaintiff's Complaint on file herein as Parcels 71-0083 A, B, C, D & E came on regularly for trial on October 5, 1981, in Department 10 of the above-entitled Court, before the Honorable James L. Focht, Judge of the Superior Court, and a jury sworn to try the issue of compensation.

Donald L. Clark, County Counsel and Jack Limber, Deputy County Counsel, appeared as attorneys for plaintiff; Goebel & Monaghan by Louis E. Goebel appeared as attorneys for defendants L. E. Morrison and Jean Morrison. Defendants Bank of America National Trust & Savings Association, Hattie I. Brewer, Vesta Gent, have appeared and answered the complaint herein.

Plaintiff and defendants L. E. Morrison and Jean Morrison entered into a stipulation regarding the compensation to be paid for fixtures and equipment in this action, and pursuant to said stipulation plaintiff deposited with the Clerk of the court the sum of $69,505.50 as the compensation for the fixtures and equipment, and in accordance with said stipulation and approval by the court defendants L. E. Morrison and Jean Morrison were paid by the Clerk of the court said sum of $69,505.50 for fixtures and equipment (less $30,782.82 which was paid by the Clerk to Jennings, Engstrand & Henrikson in satisfaction of a lien on the condemnation proceeds, filed in this action).

Evidence was introduced before the jury on the issue of the fair market value of Parcels 71-0083 A, B, C, D & E as of February 16, 1973, and on the issue of compensable loss of good will as of February 16, 1973; the cause was argued by counsel and the jury was instructed by the Court; whereupon the jury retired and deliberated and subsequently returned to court and rendered its separate verdicts in the amount of $875,000.00 as the fair market value of Parcels 71-0083 A, B, C, D & E as of February 16, 1973, which is total compensation for the taking of Parcels 71-0083 A, B, C, D & E, and in the amount of $56,250.00 as the compensable loss of good will as of February 16, 1973, which is the total compensation for compensable loss of good will.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That plaintiff seeks to take, acquire and condemn the rights, title and interests hereinafter described in and to the real property designated Parcels 71-0083 A, B, D, D, & E referred to in Paragraph III of plaintiff's Complaint and described in Exhibit "A" to plaintiff's Complaint to which description reference is hereby made, and by this reference said description is made a part hereof as though fully set forth herein; that the condemnation and taking thereof is for the public purposes set forth in the Complaint herein, and is necessary to such public uses.

2. That upon payment into Court of the total sum of $875,000.00 for the fair market value of Parcels 71-0083 A, B, C, D, & E as of February 16, 1973 (less the sums of $20,000.00 and $499,000.00 previously withdrawn by defendants L. E. Morrison and Jean Morrison), and the sum of $56,250.00 for compensable loss of good will as of February 16, 1973, together with interest at the rate of seven percent (7%) per annum on the following sums and for the dates specified below:

(a) $356,000.00 ($875,000.00 less $519,000.00) from August 13, 1980 (date County took possession of property) to the date of deposit of said sum into Court,

(b) $56,250.00 from August 13, 1980 (date County took possession of property) to the date of deposit of said sun in Court,

there shall be condemned to the plaintiff the hereinafter described interests in said real property designated Parcels 71-0083 A, B, C, D & E; said sum shall be in full payment for the condemnation and taking of said real property. Said sum shall include compensation on account of plaintiff's possession of said real property prior to the entry of this judgment.

3. That said payment as hereinabove specified shall terminate, cancel and extinguish all liens, leaseholds and encumbrances of whatsoever nature on said real property. Said sums shall be paid to defendants as follows:

For Parcels 71-0083 A, B, C, D & E the sums of $875,000.00 (less the sums of $20,000.00 and $499,000.00 previously withdrawn by defendants L. E. Morrison and Jean Morrison), and $56,250.00 for compensable loss of good will, together with interest as herein described as follows:

(a) To the COUNTY OF SAN DIEGO for taxes the sum of $2,246.58.

(b) To defendants L. E. MORRISON AND JEAN MORRISON and defendants BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, HATTIE I. BREWER, VESTA GENT, as their interests may appear, the sum of $872,753.42, less the sums of $20,000.00 and $499,000.00 previously withdrawn, together with interest as herein specified on the sums and for the dates specified below:

$356,000.00 ($875,000.00 less $519,000.00) from August 13, 1980 (date County took possession of property) to

the date of deposit of said sum into Court.

(c) To defendants L. E. Morrison and Jean Morrison the sum of $56,250.00, together with interest as herein specified on the sums and for the dates specified below:

$56,250.00 from August 13, 1980 (date County took possession of property) to the date of deposit of said sum in Court.

4. That the sum of $519,000.00 heretofore deposited into Court by plaintiff as a security deposit for the taking of Parcels 71-0083 A, B, C, D & E shall be deemed to have been deposited in partial satisfaction of this award.

5. Upon payment of said sum into Court as hereinabove specified there shall be entered in favor of plaintiff a Final Order of Condemnation for said parcel of real property.

6. That plaintiff seeks to take, acquire and condemn the fee simple title to Parcels 71-0083 A, B, C, D & E hereinabove referred to and described by reference to plaintiff's Complaint and therein designated by the same parcel number.

DATED: DEC. 15, 1981

Judge of the Superior Court

APPROVED AS TO FORM:

DONALD L. CLARK, County Counsel
Attorney for Plaintiff

GOEBEL & MONAGHAN

LOUIS E. GOEBEL
Attorneys for Defendants

* * * *

I. INTRODUCTION

Through this petition to the highest court in the State, the Morrisons seek to obtain some small semblance of just compensation for the property interests which were taken from them involuntarily by Condemnor in a process which commenced more than ten years ago.

Private property has long held a favored place in the jurisprudence of our country. The words of the United States Supreme Court are inspiring and comforting:

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be in as good a position pecuniarily as he would have if his property had not been taken."
> *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276 (1943).

The Morrisons long ago have learned that there is a dramatic difference between these glowing ideals and the practical realities of litigating with a tenacious and adversarial condemning agency. The passage of time, the vagaries of the judicial system, the delays of litigation, changes in the law, and the like, all compound the difficulty in applying general constitutional principles to real life situations to achieve equitable results.

In no way can the Morrisons hope to be "made whole" from the more than ten years of tribulations relating to the taking of their real property and the destruction of the family business operated on the property. It is only sought through this petition to the highest court of the State, and the ultimate guardian of the constitutional rights of citizens and property owners, to breathe some reality into the constitutional guarantees of just compensation by interpreting statutory provisions and general rules in light of these constitutional guarantees so as to reach a fair and just result in this -- the difficult and unusual case, as well as would have been

achieved in the simple and uncomplicated case.[1]

The Morrisons seek correction of the following errors below in order to ameliorate their losses and have the opportunity to more nearly achieve "just" compensation after more than a decade of struggle:

- A declaration that the date of valuation is not February 16, 1973, the date of original commencement of an action against their real property interests, but rather, May 9, 1980, the date the Condemnor finally *first* deposited probable just compensation for the taking of the Morrisons' real property even though the courts below held that the date of valuation was fixed at February 16, 1973;

- A declaration that it was error to deny the Morrisons' motion for recovery of litigation expenses, since by not prosecuting a cross-appeal of the original judgment, the Morrisons had clearly, unequivocally, irreversibly, and in all practical effect, made a standing offer for a period of more than two years to settle for the amount of the original judgment -- $837,000 -- which is less than the amount the jury ultimately awarded in the second trial of the action;

- A declaration that the Morrisons are entitled to recover for loss of business goodwill since their business was not destroyed until August of 1980, and the operative date of the legislation which authorized recovery for loss of business goodwill was July 1, 1976.[2]

---

[1] The Court of Appeal readily acknowledged that the results were "unfair" and "harsh" as to the Morrisons, but apparently felt constrained to the role of statutory interpretation. As will be pointed out hereafter, the California and United State [*sic*] Constitutions that "just compensation" be achieved in substance as well as form.

[2] Since the granting of a hearing by this Court will have the effect of vacating the most recent opinion of the Court of Appeal, the Morrisons will further urge that this Court incorporate in its opinion and judgment the holding of the Court of Appeal in regard to the requirement that the Morrisons be paid "market rate" interest, rather than interest restricted by a statutory seven percent limitation.

II. LEGAL ISSUES PRESENTED

By this petition, the Morrisons seek to have this Court settle important questions of constitutional law regarding the taking of real property and resolve important questions and facilitate uniformity of decision in related areas regarding the taking of real property and the destruction of business goodwill.

These Questions include:

1. DO THE JUST COMPENSATION GUARANTEES OF THE CALIFORNIA AND UNITED STATES CONSTITUTIONS PERMIT A CONDEMNOR TO TAKE PROPERTY IN 1980 AND PAY FOR IT AT 1973 VALUES?

2. ON RETRIAL AFTER A CONDEMNOR'S APPEAL, WHERE THERE IS NO DEPOSIT TO FIX A DATE OF VALUATION, DOES NOT THE CONSTITUTIONAL MANDATE OF JUST COMPENSATION REQUIRE A NEW, CURRENT DATE OF VALUATION IN THE INTEREST OF JUSTICE?

3. WHERE THE JURY VERDICT IN THE SECOND TRIAL IS HIGHER THAN THE AMOUNT THAT THE PROPERTY OWNERS CLEARLY, UNEQUIVOCALLY AND IRREVERSIBLY OFFERED TO SETTLE AT FOR MORE THAN TWO YEARS PRIOR TO THE RETRIAL, IS NOT THE ONLY LOGICAL, PRACTICAL AND EQUITABLE RESULT THAT THE PROPERTY OWNERS RECOVER THE LITIGATION EXPENSES OF THE RETRIAL THEY WERE FORCED THROUGH BY THE CONDEMNOR?

4. WHERE THE LEGISLATURE EXPRESSLY EVIDENCED THE INTENT THAT POST-1976 LAW REGARDING BUSINESS GOODWILL APPLY "TO THE FULLEST EXTENT PRACTICABLE," IS IT REASONABLE OR CONSISTENT WITH LEGISLATIVE INTENT THAT ONE WHOSE BUSINESS GOODWILL IS DESTROYED ONLY IN 1980 BE BOUND BY PROVISIONS OF PRE-1976 LAW?

III. HISTORY

The uniqueness of this case flows in substantial part from its history. Thus, its factual and procedural history will be detailed:

- About 1962 -- The Morrisons begin operation of a sand extraction business on a large parcel of replenishing sand property in Bonita, California, a then rural area near San Diego, acquiring over the years other parcels of adjoining property.

- February 16, 1973 -- County of San Diego filed a complaint in eminent domain to acquire the Morrisons' real property in fee. Clerk's Transcript 1 (hereinafter "C.T.").

- April 17, 1974 -- First trial of the eminent domain action commenced before the Honorable Gilbert Harelson. C.T. 224.

- November 15, 1974 -- Judgment was entered, awarding the Morrisons $837,000 for the real property interest taken, based upon February 16, 1973 date of valuation. C.T. 228, 231-33.

- November 27, 1974 -- Condemnor appealed from the judgment. C.T. 236.

- The Morrisons did not prosecute a cross-appeal.

- July 1, 1976 -- The operative date (for most cases) of the comprehensive revision of the California eminent domain law, CCP §§1230.010, *et seq.*

- February 14, 1977 -- Court of Appeal filed its opinion reversing the original judgment and remanding the case for a new trial. C.T. 242.

- April 18, 1977 -- Remittitur entered by San Diego Superior Court. C.T. 241.

- July 26, 1978 -- Date scheduled for retrial. C.T. 391:9-11.

- May 9, 1980 -- Condemnor makes deposit of probable just compensation in the amount of $519,000. C.T. 256.

- August 13, 1980 -- Condemnor takes possession of the Morrisons' real property, the Morrisons and their business are dispossessed, and their business goodwill is lost. C.T. 256-60.

- October 5, 1981 -- Retrial or second trial commenced before a jury, Honorable James L. Focht, presiding. Reporter's Transcript 1 (hereinafter "R.T.").

- October 28, 1981 -- Jury returned a verdict for the value of the real property in the amount of $875,000 ($38,000 more than the previous judgment). The date of valuation by the Trial Court was February 16, 1973. R.T. 932.

- December 16, 1981 -- Judgment in Condemnation entered. C.T. 406.

- February 11, 1982 -- Condemnor filed notice of appeal re goodwill award. C.T. 434.

- February 11, 1982 -- Morrisons' motion for recovery of litigation expenses denied. C.T. 449.

- March 5, 1982 -- Morrisons filed notice of cross-appeal. C.T. 444.

- March 19, 1984 -- Court of Appeal filed opinion on appeals from second judgment. Appendix A.

- April 17, 1984 -- Court of Appeal filed "Order Modifying Opinion." Appendix A.

- April 30, 1984 -- Morrisons filed timely Petition For Hearing.

IV. A NEW CURRENT DATE OF VALUATION FOR THE RETRIAL WAS CONSTITUTIONALLY NECESSARY

The Court of Appeal openly acknowledged that the result of use of the original date of valuation in the retrial was harsh:

> "This result is harsh, especially when several inflationary years separate the issuance of summons and retrial." Slip Opinon, [*sic*] page 13.

However, the Court of Appeal felt constrained to permit the harsh result because of its reliance upon interpretation of statute. This failure to understand and apply the mandates of the United States and California Constitutions compel the granting of a hearing in this case and a reversal of the judgment.

The trial court and the Court of Appeal were preoccupied with the provisions of statute. Statutory procedures are necessary in an area such as eminent domain. But, however helpful these detailed provisions of statute may be, it must be remembered that the *ultimate* test of eminent domain power lies in the Constitution.

The case of *United States v. Miller, supra,* summarizes the general standards widely accepted by the case law:

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be in as good a position pecuniarily as he would have if his property had not been taken." 317 U.S. 369, 63 S.Ct. 276, 279-80.

The constitutional checks upon the exercise of the power of eminent domain are entrenched in California cases as well. This Court has declared:

> "The provision of the Constitution compelling the payment of just compensation for a public taking of property (Cal.Const., Art. I, §14) is self-executing. Since this is so it has consistently been held, in inverse condemnation cases, that inherent power is reposed in the trial court to provide for the assessment of just compensation in situations not within the purview of existing statutory provisions."
> *Citizens Utilities Co. v. Superior Court,* 59 Cal.2d 805, 812 (1963).

In the *Citizens Utilities Co.*, case, the California Supreme Court expressly approved the trial court's departure from the very statute involved here, CCP §1249, as follows:

> "The trial court, in the instant case, was empowered to devise a procedure whereby the value of petitioner's water system could be *justly* and *constitutionally* assessed. This it did by providing that in the case of petitioner the condemned property should be assessed not as of the date of the summons, but as of the date of trial. This was a proper exercise of the inherent power of the trial court."
> 59 Cal.2d at 812 (emphasis added).

This Court has clearly held that "the [property owner's] right to just compensation cannot be made to depend upon State statutory provisions..."
Heimann v. City of Los Angeles, 30 Cal.2d 746, 759 (1947).

This is consistent with - indeed, mandated under the Supremacy Clause by - United States Supreme Court decisions:

> "It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right and section 10 of the Lever Act directs payment. The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking."
> *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 43 S.Ct. 354, 356 (1923)

In applying these Constitutional requirements, considerations of fundamental fairness and equity require that the date of valuation be the date of deposit of probable just compensation, and not the date of

commencement of the action or issuance of the summons. To permit otherwise is to permit the condemnor to freeze the property value for more than eight years without making available to the Morrisons one penny of just compensation.

It is clear from the record that the Condemnor did not bring the case to trial within one year of the issuance of summons.

Likewise, it is clear from the record that the Condemnor did not bring the matter to retrial within one year after the issuance of the remittitur. (Remittitur entered April 18, 1977 [C.T. 241], first trial date set thereafter, July 26, 1978 [C.T. 391].

In California, a condemnor is not permitted to act as self-interested adversary in all respects. To the contrary, this Court has declared that the condemnor has a quasi-judicial role. As Mr. Justice Sullivan stated in *City of Los Angeles v. Decker,* 18 Cal.3d 860, 871 (1977):

> "The condemnor acts in a quasi-judicial capacity and should be encouraged to exercise his tremendous power fairly, equitably and with a deep understanding of the theory and practice of just compensation."
> 18 Cal.3d at 871.

A deep understanding of the theory and practice of just compensation would clearly indicate that a condemnee is not receiving just compensation, *i.e.,* being "put in as good position pecuniarily as he would have occupied if his property had not been taken," if he receives only in 1980, dollars of 1980 value for real property of which the value is based on 1973 values.

The Condemnor which now claims always to have been eager to go to trial could have ameliorated the situation dramatically anytime between 1973 and 1980 by making a deposit of probable just compensation.

The detailed state procedural rules have now caught up with the constitutional principles. Section 1263.140 of the Code of Civil Procedure provides:

> "Subject to Section 1263.110 [the deposit provision], if a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the

> commencement of the proceeding, the date of valuation is the date of commencement of such new trial unless, in the interest of justice, the court ordering the new trial orders a different date of valuation."

This section was part of the comprehensive revision of the eminent domain law, sometimes referred to as AB 11, and was operative July 1, 1976, over five years before the commencement of the retrial in this case. The Legislative Committee Comment to this section expressly notes the injustice of the case of *People v. Murata*, 55 Cal.2d 1 (1960), and indicates that the above section is intended to avoid this injustice. The Comment further notes, as mentioned above, that the condemnor can fix the valuation date at any time by making a deposit.

Thus, it is clear under the unique facts, circumstances, and timing of this case that the only fair and equitable -- and constitutionally permissible -- date of valuation is the date of deposit, May 9, 1980. C.T. 256.

Given the new statute, the rampant inflation in property values in the decade of the 70's, and the unique facts and timing of this case, *People v. Murata, supra,* cannot constitutionally be controlling. The Court of Appeal's reliance on it was misplaced, and to the extent it is asserted here, it should be overruled, disapproved or limited to its own facts.

* * * *

4 Civil 26710

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

COUNTY OF SAN DIEGO,

Plaintiff and Appellant,

vs.

L.E. MORRISON, et al.,

Defendants and Cross-Appellants.

CROSS-APPELLANTS' OPENING BRIEF

Defendants/cross-appellants, L.E. Morrison, et al. (hereinafter "Morrison"), respectfully submit the following brief in support of their cross-appeal from the judgment entered herein and from the order denying their motion for recovery of litigation expenses.

I

INTRODUCTION

By this cross-appeal (and resistance to the County's related appeal), Morrison seeks to obtain some small semblance of just compensation for the property interest taken from them involuntarily by the County more than 10 years ago.

Private property has long held a favored place in the jurisprudence of our nation. The words of the United States Supreme Court are inspiring and comforting:

> The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be out in as good position pecuniarily as he would have occupied if his property had not been taken.
>
> *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276 (1943).

The Morrisons long ago have found out that there is a dramatic difference between these glowing ideals and the practical realities of litigating with a tenacious and adversarial condemning agency. The passage of time, the vagaries of the judicial system, the delays of litigation, changes in the law, all compound the difficulty in applying general constitutional principles to real life situations to achieve equitable results.

In no way can the Morrisons hope to be "made whole" from the more than 10 years of tribulations relating to the taking of their real property and the destruction of the family business operated on the property. It is only sought through this cross-appeal to breathe some reality into the constitutional guarantees by interpreting statutory provisions and general rules in light of constitutional guarantees so as to reach a fair and just result in this -- the difficult and unusual case -- as well as in the simple and uncomplicated case.

The Morrisons seek correction of the following errors of the trial court in order to ameliorate their losses and have the opportunity to more nearly achieve "just" compensation after more than a decade of struggle:

- A declaration that the date of valuation is not February 16, 1973, the date of commencement of this action, but rather, May 9, 1980, the date the County finally first deposited probable just compensation for the taking of the Morrisons' real property;

- A declaration that the amount of any award, not offset by previous deposit or continued possession, bears interest from August 13, 1980, not at the rate of 7% per annum as presently provided for in the judgment, but at the prevailing market rate of interest;

- A declaration that it was error to deny the Morrisons' motion for recovery of litigation expenses, since by not prosecuting a cross-appeal of the original judgment, the Morrisons in practical effect made a standing offer to settle for the amount of the original judgment -- $837,000 -- which is less than the amount the jury ultimately awarded in the second trial of the action.

II

HISTORY

The uniqueness of this case flows in substantial part from its history. Thus, its factual and procedural history will be detailed:

- About 1962 -- The Morrisons begin operation of a sand extraction business on a large parcel of replenishing sand property in Bonita, California, adding over the years other parcels of property.

- February 16, 1973 -- County of San Diego filed a complaint in eminent domain to acquire the Morrisons' real property in fee. Clerk's Transcript 1 (hereinafter "C.T.").

- April 17, 1974 -- Trial of the eminent domain action commenced before the Honorable Gilbert Harelson. C.T. 224.

- November 15, 1974 -- Judgment was entered, awarding the Morrisons $837,000 for the real property interest taken. C.T. 228, 231-33.

- November 27, 1974 -- The County appealed from the judgment. C.T. 236.

- July 1, 1976 -- The operative date (for most cases) of the comprehensive revision of the California eminent domain law, CCP §§1230.010, *et seq*.

- February 14, 1977 -- This Court filed its opinion reversing the original judgment and remanding the case for a new trial. C.T. 242.

- April 18, 1977 -- Remittitur entered. C.T. 241.

- July 26, 1978 -- Date scheduled for retrial. C.T. 391:9-11.

- May 9, 1980 -- County makes deposit of probable just compensation in the amount of $519,000. C.T. 256.

- August 13, 1980 -- County takes possession of the Morrisons' real property, the Morrisons are dispossessed, and their business goodwill is lost. C.T. 256-60.

- October 5, 1981 -- Retrial commenced before a jury, Honorable James L. Focht, presiding. Reporter's Transcript 1 (hereinafter "R.T.").

- October 28, 1981 -- Jury returned a verdict for the value of the real property in the amount of $875,000 ($38,000 more than the previous judgment). R.T. 932.

- December 16, 1981 -- Judgment in condemnation entered. C.T. 406.

- February 11, 1982 -- County filed notice of appeal re goodwill award. C.T. 434.

- February 11, 1982 -- Morrisons' motion for recovery of litigation expenses denied. C.T. 449.

- March 5, 1982 -- Morrisons filed notice of cross-appeal. C.T. 444.

III

ISSUES PRESENTED ON CROSS-APPEAL

In order to effectuate just compensation to the Morrisons, the judgment must be reversed and the case remanded for retrial to correct the following prejudicial errors committed below:

1. The date of valuation must be May 9, 1980, the date of deposit of probable just compensation -- not February

16, 1973, a date more than seven years before the deposit of probable just compensation and more than eight years before the date of trial.

2. The amount awarded the Morrisons under the judgment and not offset by prior deposit or continuing possession, should bear interest at prevailing market rates from and after August 13, 1980 -- not 7% per annum as provided for in the existing judgment.

3. Since the County had a standing offer to settle the Morrisons' case for the original judgment ($837,000) and since the jury determined the fair market value of the real property to be even greater, to wit, $875,000, the Morrisons are entitled to recover their litigation expenses.

IV

RULES OF PROCEDURE IN EMINENT DOMAIN MUST BE FLEXIBLY APPLIED TO SATISFY CONSTITUTIONAL MANDATES.

A great deal of attention was given by the trial court to the detailed provisions of statute -- and presumably, these detailed, incomplete, overlapping, and sometimes confusing provisions will be urged by the County in this Court as well.

However helpful these detailed provisions of statute may be, it must be remembered that the ultimate test of eminent domain power lies in the Constitution.

The case of *United States v. Miller, supra*, summarizes the general provisions as widely accepted by the case law:

> The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken. 317 U.S. 369, 63 S.Ct. 276, 279-80.

The constitutional checks upon the exercise of the power of eminent domain are entrenched in California cases as well. The California Supreme Court had declared:

> The provision of the Constitution compelling the payment of just compensation for a public taking of property (Cal.Const., Art. I, §14) is self-executing. Since this is so it has consistently been held, in inverse condemnation cases, that inherent power is reposed in the trial court to provide for the assessment of just compensation in situations not within the purview of existing statutory provisions.
>
> *Citizens Utilities Co. v. Superior Court*, 59 Cal.2d 805, 812 (1963).

In the *Citizens Utilities Co.*, case, the California Supreme Court expressly approved the trial court's departure from the very statute involved here, CCP §1249, as follows:

> The trial court, in the instant case, was empowered to devise a procedure whereby the value of petitioner's water system could be *justly* and *constitutionally* assessed. This it did by providing that in the case of petitioner the condemned property should be assessed not as of the date of the summons, but as of the date of trial. This was a proper exercise of the inherent power of the trial court.
>
> 59 Cal.2d at 812 (emphasis added).

V

THE DATE OF VALUE MUST BE THE DATE OF DEPOSIT OF PROBABLE JUST COMPENSATION, NOT THE DATE OF FILING.

Considerations of fundamental fairness and equity require that the date of valuation be the date of deposit of probable just compensation, and not the date of commencement of the action or issuance of the summons. To permit otherwise is to permit the County to freeze the property value for more than eight years without making available to the Morrisons one penny in just compensation.

It is clear from the record that the County did not bring the case to trial within one year of the issuance of summons. C.T. 1, 224.

Likewise, it is clear from the record that the County did not bring the matter to retrial within one year after the issuance of the remittitur. (Remittitur entered April 18, 1977 [C.T. 241]; first trial date set thereafter, July 26, 1978 [C.T. 391:9-11].)

In California, a condemnor is not permitted to act as a self-interested adversary in all respects. To the contrary, our Supreme Court has declared that the condemnor has a quasi-judicial role. As Mr. Justice Sullivan stated in *City of Los Angeles v. Decker*, 18 Cal.3d 860, 871 (1977):

> The condemnor acts in a quasi-judicial capacity and should be encouraged to exercise his tremendous power fairly, equitably and with a deep understanding of the theory and practice of just compensation.
>
> 18 Cal.3d at 871.

A deep understanding of the theory and practice of just compensation would clear indiate that a condemnee is not receiving just compensation, *i.e.*, being "put in as good position pecuniarily as he would have occupied if his property had not been taken," if he receives only in 1980, dollars of 1980 value for real property of which the value is based on 1973 values.

The condemnor-County which now claims always to have been eager to go to trial could have ameliorated the situation dramatically anytime between 1973 and 1980 by making a deposit of probable just compensation.

The detailed procedural rules have now caught up with the constitutional principles. Section 1263.140 of the Code of Civil Procedure provides:

> Subject to Section 1263.110 [the deposit provision], if a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the commencement of the proceeding, the date of valuation is the date of commencement of such new trial unless, in the

> interest of justice, the court ordering the new trial orders a different date of valuation.

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Thus, it is clear under the unique facts, circumstances, and timing of this case that the only fair and equitable -- and constitutionally permissible -- date of valuation is the date of deposit, May 9, 1980. C.T. 256.

FORMER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1249 REPEALED EFFECTIVE 1976, BUT APPLIED TO THIS CASE.

For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in Section 1248; provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

No. __ -__

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

L.E. MORRISON and JEAN MORRISON,

Petitioners,

vs.

COUNTY OF SAN DIEGO,

Respondent.

PROOF OF SERVICE BY MAIL

GOEBEL & MONAGHAN
Louis E. Goebel
401 West "A" Street
Suite 1815
San Diego CA 92101
619/231-0059

Counsel for Petitioners

PROOF OF SERVICE BY MAIL

I, M.J. Harman, declare:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action. My business address is 401 West "A" Street, Suite 1815, San Diego, California 92101.

On September 19, 1984, I served the within PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA in re L.E. Morrison and Jean Morrison, Petitioners vs. County of San Diego, Respondent, in the United States Supreme Court, October Term, 1984, No. __-__, upon the parties to the action, by placing three copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California, addressed as follows:

Court of Appeal
Fourth Appellate District
Division One
1350 Front Street, Suite 6010
San Diego CA 92101

California Supreme Court
4250 State Building
350 McAllister Street
San Francisco CA 94102

Sandra J. Brower
Deputy County Counsel
355 County Administration Center
1600 Pacific Highway
San Diego CA 92101

Hon. James L. Focht
San Diego County Superior Court
P.O. Box 128
San Diego CA 92112

All parties required to be served have been served. I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed September 19, 1984, at San Diego, California

M.J. Harman